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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 462

PHILIP HARRY KOOLISH AND SARAH ALLEN KOOLISH, INDIVIDUALLY AND TRADING AS STANDARD DISTRIBUTING COMPANY, PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 118–120) is reported in 129 F. (2d) 64.

JURISDICTION

The opinion of the Circuit Court of Appeals and the decree affirming the order of the Federal Trade Commission were filed on June 9, 1942 (R. 118–120). Petition for rehearing was denied on July 16, 1942 (R. 151), and the decree of the Circuit

Court of Appeals was entered on the same day (R. 151–153). The petition for writ of certiorari was filed on October 16, 1942. The jurisdiction of this Court is invoked under Section 5 of the Federal Trade Commission Act, as amended, 52 Stat. 111, 15 U. S. C. sec. 45, and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Commission and the court below erred in concluding that petitioners' plan of selling merchandise involves the use of a gambling device, and is an unfair method of competition in commerce.

2. Whether the court below erred in failing to limit the scope of the Commission's order.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U. S. C. sec. 45, provides in part as follows:

> SEC. 5 (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.
>
> * * * * * *

(c) * * * The findings of the Commission as to the facts, if supported by evidence, shall be conclusive.

STATEMENT

Petitioners seek review of a decree of the court below affirming and adopting an order of the Federal Trade Commission issued after notice and hearing in a proceeding under Section 5 of the Federal Trade Commission Act. The order (R. 100–101) directed petitioners to cease and desist from continuing certain unfair methods of competition in commerce.

The Commission's findings of fact (R. 95–100) may be summarized as follows:

Petitioners are engaged in selling and distributing in interstate commerce in competition with others a variety of articles of merchandise including flash lights, electric mixers, sport jackets, cosmetics, bill folds, pen and pencil sets, and others (R. 96). In carrying out this merchandising, petitioners use a certain "selling plan or method." Typical of this method of distribution is petitioners' plan for the sale of portable radio sets. Without prior request, petitioners distribute to individuals by mail push cards, together with literature and circulars describing the radio and the manner in which the cards operate. (R. 96–98.) A typical push card has on its face 62 partially perforated small disks, each printed with a feminine name and the word "Push." Concealed beneath

the surface of each small disk is a number that is disclosed when the disk is separated from the card by being pushed. That number determines the price which the person playing the card pays. The card also has on its face a large partially perforated disk to be removed when the entire card has been sold; beneath the surface of the large disk is a feminine name. The person who selected the small disk containing that name receives the principal prize, in this instance a radio. The instructions on the card explain that the disks concealing certain specified numbers shall receive subsidiary prizes. On the back of the card is a list of the feminine names followed by a blank space in which the person operating the card writes the name of the player pushing out each one of the disks. Illustrations of the principal prize (in this case a radio set) and the lesser prizes (in this case four combination pen and pencil sets) also appear on the card.

A letter, which accompanies the push card and the selling literature, informs the recipient that in order to obtain a radio for himself he need only show the enclosed materials to friends, neighbors, and persons with whom he trades and explain to them how they might obtain a radio [*i. e.,* by selecting the lucky name on the push card]. The letter also states that upon receipt of an order petitioners will send to the person submitting the order two radios and four combination pen and pencil sets; one radio to be retained by the push card oper-

ator, one radio to be given to the person who selected the name appearing under the large seal on the push card, and the pen and pencil sets to be given to persons who have pushed disks concealing certain specified numbers. The literature and push card are accompanied by a printed order form for the purchase of two radios and four combination pen and pencil sets at a total price of $16.95. Since the total sum of payments called for by the push card is $16.95, the operator of the card makes a profit equivalent to at least one radio.

Petitioners offer other articles and merchandise under a substantially similar plan, varying only in details. Each group of merchandise offered by the petitioners under the plan includes two identical principal articles and other articles of lesser value intended to be subsidiary prizes. Under the plan it is intended that one of the two identical principal articles of merchandise will be retained by the person using the push card, that the other will be given to the person selecting the name concealed beneath the large disk on each push card, and that the subsidiary prizes will be allotted to the persons selecting the disks concealing the prize winning numbers. In each instance the total amount of payments called for by the push card is exactly equal to the amount stated on the printed order form for the articles of merchandise referred to on the push card, plus one additional article identical with the principal prize. (R. 97–99.)

Many of the individuals and dealers to whom petitioners furnished push cards have used, and do use, the cards in distributing the merchandise bought from the petitioners. Thus the sale of merchandise according to petitioners' plan involves a game of chance to procure an article of merchandise at a price less than the normal retail price, and the use of the plan is contrary to the established public policy of the United States and in violation of the criminal laws. (R. 99.)

Petitioners' use of this method in the sale of merchandise has a tendency to divert trade to the petitioners from competitors who do not adopt the same or equivalent methods.[1] Many competitors of the petitioners are unwilling to adopt such methods and the trade of these competitors is injured by the tendency of purchasers to prefer peti-

[1] In the course of their business, petitioners have distributed more than a million of the merchandise offers of the type described above, accompanied by push cards, and have received orders for merchandise from individuals, dealers, and others to whom such offers are mailed. During the twelve months' period ending November 1940 they sold approximately $1,800,000 worth of merchandise. In most instances the orders received are for the articles listed on the printed order form mailed out with the push card and cover two identical principal articles and subsidiary premiums listed on the card. Petitioners receive orders from approximately one percent of the individuals and dealers to whom push cards and circulars are sent. When shipments are made on orders petitioners include literature and push cards relating to other merchandise under the same plan. About twenty-five percent of the persons to whom sales are made send reorders or additional orders. (R. 98–99.)

tioners' merchandise because of the element of chance involved in its sale. (R. 99–100).

The Commission accordingly found that this merchandising plan operates to the prejudice of the public and petitioners' competitors and constitutes an unfair method of competition in commerce within the meaning of Section 5 of the Federal Trade Commission Act (R. 100).

On the basis of these findings the Commission entered its order (R. 100–101) which provides that the petitioners "in connection with the offering for sale, sale, or distribution of any merchandise in commere," shall cease and desist from indirectly or directly:

1. Supplying merchandise together with push cards or other lottery devices that are used or may be used in selling or distributing such merchandise to the public;

2. Supplying push cards or other lottery devices, with merchandise or separately, that are to be used or may be used in selling or distributing such merchandise to the public, and

3. Selling merchandise by the use of push cards or other lottery devices.[2]

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[2] In their brief (p. 6) petitioners state erroneously that the order of the Commission in this case may be considered as an attempt broadly to prohibit the distribution of push cards or other gambling devices in interstate commerce, whether distributed with merchandise or distributed separately and independently. It is apparent that the Commission's order relates only to the use of push cards or lottery

ARGUMENT

The principal questions raised by petitioners in this case are settled by the decision in *Federal Trade Commission* v. *Keppel & Bro.*, 291 U. S. 304. In that case the plan or method of selling candy, to be resold through lottery or gambling devices, was held to be an unfair method of competition within the meaning of Section 5 of the Federal Trade Commission Act. In this case the Commission found that petitioners had adopted a plan or method of selling various articles of merchandise involving the use of a gambling or lottery device that unfairly diverts trade to petitioners from their competitors.[3] Upon this finding the Commission and the court below, we submit, correctly concluded that this plan involving an element of chance, is contrary to public policy and constitutes an unfair method of competition within the principle established in *Federal Trade Commission* v. *Keppel & Bro., supra.*

1. Petitioners attempt to distinguish the *Keppel* case on the ground that the push cards are supplied before the merchandise is ordered, that the custom-

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devices in connection with the sale of merchandise. Whether push cards or other lottery devices may be distributed independently of the sale of merchandise as separate articles of commerce is not an issue in this proceeding and no such claim has been made by the Commission in this case.

[3] The sufficiency of the finding in this case with respect to injury to competitors is settled by *Federal Trade Commission* v. *Raladam Co.*, 316 U. S. 149, which involved a substantially similar finding.

ers who purchase merchandise from them may or may not use the push card to re-sell the merchandise and that the payments to them for merchandise do not depend upon whether the push card is used or not, and, therefore, the merchandise is not "committed" to distribution to the public through the use of the gambling device as was the merchandise in the *Keppel* case (Pet. 2, 8–14).

But this distinction is without merit. The fact that the push card is furnished to the purchaser separately and before the order is placed does not alter the nature of petitioners' sales plan. Indeed, the prior distribution of the push cards emphasizes the character of the plan as a whole. It indicates that the scheme of merchandising rests on the intended use of the push cards and begins with their distribution. A plan which so closely contemplates, even though it does not formally require, the use of a gambling device is indistinguishable from that condemned in the *Keppel* case. The circuit courts of appeals have not recognized asserted distinctions of the character here urged. *Cf. Chicago Silk Co.* v. *Federal Trade Commission,* 90 F. (2d) 689 (C. C. A. 7), certiorari denied, 302 U. S. 753, and cases cited *infra,* note 5.

It is also argued (Pet. 14–21) that the Commission erred in concluding that the merchandising plan, involving, as it does, a game of chance, is contrary to public policy; this contention is based on

the assertion that games of chance are in themselves neither criminal nor contrary to public policy. In support of this proposition petitioners urge that (1) Congress has failed to enact certain bills which, if enacted, would prohibit the sending of gambling devices through the mails; (2) several states have passed statutes authorizing horse racing; (3) the National Industrial Recovery Administration approved a code of fair competition for manufacturers of push cards; and (4) revenue from slot machines is taxed by the Federal Government. But whether or not these devices are criminal is beside the point. The question here presented is whether the use of a gambling device as part of a scheme to sell merchandise is an unfair method of competition. Competitors of petitioners refuse to attempt the same or similar schemes for selling merchandise despite the resultant loss in trade. And the compulsion which operates on competitors in this respect is indistinguishable from that involved in the *Keppel* case.

Moreover, the fact that both the state and Federal Governments tax revenues from other gambling devices does not reflect a public policy approving either the devices taxed or others. Nor does the failure of Congress to prohibit the mailing of these devices imply public approval of them.[4]

[4] The fact that the Postmaster General has issued a third-class mailing permit to petitioners does not establish any

That these devices do in fact offend public policy was indicated in the *Keppel* case; and the uninterrupted line of decisions in the federal courts since that case, condemning the use of push cards as part of a plan to sell merchandise [5] discloses that there has been no change in public policy in this respect.[6]

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conflict between the Commission's order and the postal regulations, as petitioners contend (Pet. 14–18). Nothing in the postal regulations or the statutes conferring authority on the Postmaster General suggests that Congress intended that he should have the power to grant immunity from the requirements of the Federal Trade Commission Act. In determining whether to grant a postal permit, the Postmaster General is not charged with any responsibility to decide upon the validity of merchandising plans under the Federal Trade Commission Act. And he cannot, by granting mailing privileges, foreclose the Federal Trade Commission from carrying out the duties with which it is charged by that Act. The granting of the mailing permits therefore did not give petitioners immunity from the requirements of Section 5 of the Federal Trade Commission Act. *Schreiber* v. *United States*, 129 F. (2d) 836 (C. C. A. 7), cited by petitioners, dealt with the propriety, under the postal classifications, of requiring that push cards be sent by first-class rather than by third-class mail. The Federal Trade Commission Act was in no way involved.

[5] See, for example, *Federal Trade Commission* v. *F. A. Martoccio Co.*, 87 F. (2d) 561 (C. C. A. 8), certiorari denied, 301 U. S. 691; *Helen Ardelle, Inc.* v. *Federal Trade Commission*, 101 F. (2d) 718 (C. C. A. 9); *National Candy Co.* v. *Federal Trade Commission*, 104 F. (2d) 999 (C. C. A. 7), certiorari denied, 308 U. S. 610; *Chicago Silk Co.* v. *Federal Trade Commission*, 90 F. (2d) 689 (C. C. A. 7), certiorari denied, 302 U. S. 753; *Kritzik* v. *Federal Trade Commission*, 125 F. (2d) 351 (C. C. A. 7).

[6] In their brief (p. 12) petitioners suggest that their merchandising plan may be distinguished from that involved in

2. The Commission's order directs petitioners, in connection with offering merchandise for sale, to cease and desist from (1) supplying merchandise together with gambling devices that are to be used or "may be used" in selling or distributing merchandise to the public; and (2) supplying gambling devices either together with merchandise or separately, that are to be used or "may be used" in selling such merchandise to the public. The court below affirmed the order and adopted it verbatim as part of its decree. Petitioners contend that the decision of the Circuit Court of Appeals for the Ninth Circuit in *Lee Boyer's Candy* v. *Federal Trade Commission,* 128 F. (2d) 261, and cases cited therein, conflict with the decision below on the question whether the inclusion of the term "may be used" in the Commission's order is appropriate.

However, the affirmance of the Commission's order in the instant case does not conflict with the decisions relied upon by petitioners. In all those

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the *Keppel* case on the ground that there the candy was sold to children who were incapable of exercising mature judgment and that therefore an element of deception, which is here lacking, entered into the plan. It is clear, however, that the decision in the *Keppel* case does not depend upon the maturity of the ultimate consumers (see p. 309). (Cf. *Hofeller* v. *Federal Trade Commission*, 82 F. (2d) 647 (C. C. A. 7), certiorari denied, 299 U. S. 557; *Federal Trade Commission* v. *F. A. Martoccio Co.*, 87 F. (2d) 561 (C. C. A. 8), certiorari denied, 301 U. S. 691.

cases,[7] that part of the order from which the term "may be used" was stricken related to the distribution of merchandise which may be used as part of a lottery, and not to lottery devices which may be used as part of a merchandising scheme. A prohibition against distributing merchandise itself obviously should be more narrowly limited than a prohibition against distributing lottery devices in connection with merchandising.[8] It is apparent that there is no conflict in decision with respect to any issue that is raised in this case.

The character and terms of the orders which must be framed in these cases of necessity depend upon, and vary with, the practices sought to be prohibited in each particular case. The words "may be used" in the order in this case are particularly appropriate since petitioners' sales plan involves the distribution of the gambling device at a differ-

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[7] *Lee Boyer's Candy* v. *Federal Trade Commission*, *supra*; *Helen Ardelle, Inc.* v. *Federal Trade Commission*, 101 F. (2d) 718 (C. C. A. 9); *Federal Trade Commission* v. *Charles N. Miller Co.*, 97 F. (2d) 563 (C. C. A. 1); *Sweets Co. of America* v. *Federal Trade Commission*, 109 F. (2d) 296 (C. C. A. 2).

[8] Indeed, in both the *Lee Boyer's* case and the *Helen Ardelle* case (on which the former rests) another portion of the order contained an almost identical provision with that involved in this case. In the Commission's order in this case there is no paragraph comparable to that from which the words "may be used" were stricken in the *Lee Boyer's* and *Helen Ardelle* cases.

ent time than the distribution of the merchandise. The order was framed to prevent the petitioners from continuing to supply a gambling device as part of their merchandising plan and then disclaiming responsibility for its subsequent use in reselling that merchandise.

In other circumstances, slightly different formulations may suffice to cover the evils sought to be prevented. But, in any event, the differences in phraseology which the allegedly conflicting decisions permit raise no questions of substance with respect to the statute or the Commission's power thereunder. They are addressed merely to the appropriateness of the language of the decree, on the objectives of which the courts are in complete agreement.[9]

CONCLUSION

The decision below is correct, no conflict with decisions in other circuit courts of appeals is established, and no important question is presented on

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[9] Thus even in the allegedly conflicting cases the changes imposed by the reviewing courts were not substantial. In *Federal Trade Commission* v. *Charles N. Miller Co.*, 97 F. (2d) 563 (C. C. A. 1), the court changed the word "may" to the words "are designed to be." Similarly in *Sweets Co. of America* v. *Federal Trade Commission*, 109 F. (2d) 296 (C. C. A. 2), the court modified "may be" to "are likely to be." See *Helen Ardelle, Inc.* v. *Federal Trade Commission*, 101 F. (2d) 718, 721 (C. C. A. 9). There is little difference in the effect of these phrases so far as the objective of eliminating the unfair method of competition is concerned.

this record.[10] It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

Respectfully submitted.

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NOVEMBER 1942.

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[10] Petitioners state, as one of the questions presented (Pet. 3, 7) that the evidence is not sufficient to support the Commission's findings (a) that many persons to whom petitioners furnished push cards subsequently used those cards in selling and distributing merchandise, and (b) that many persons are attracted by petitioners' sales plan by reason of the element of chance involved therein and are thereby induced to buy and sell petitioners' merchandise in preference to that offered for sale by competitors.

Petitioners assert that they do not rely upon this question as a reason for granting a writ of certiorari, but state that they do intend to brief the point if the writ is granted. (Pet. 7.) It is sufficient to point out in these circumstances that the Circuit Court of Appeals, after examining petitioners' contention, has unanimously concluded that the Commission's findings are supported by the evidence (R. 119).

U. S. GOVERNMENT PRINTING OFFICE: 1942